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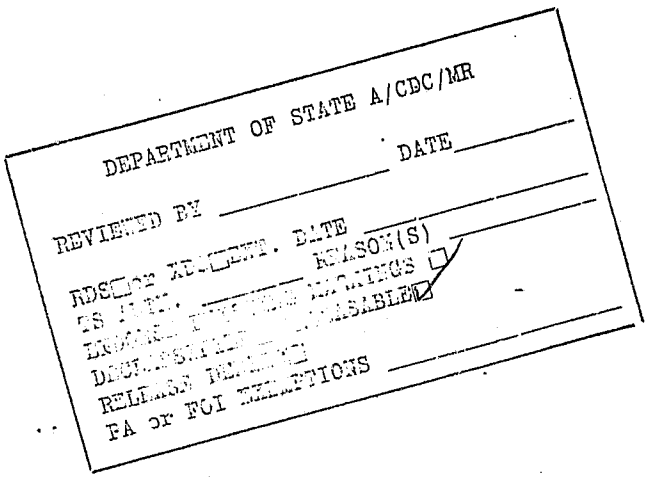
CONSULAR RESPONSIBILITIES AND LIMITATIONS



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Legal Basis for the Functions of United States Consular Officers Abroad

The Foreign Service Act of 1946, as amended provides generally for the commissioning of Foreign Service officers and employees as consular officers, 1/ and the assignment of such officers and employees to posts abroad. 2/ However, the Act does not purport to specify the functions of consular officers. Rather, it directs the officers and employees of the Foreign Service, under the direction of the Secretary of State, to "perform the duties and comply with the obligations resulting from the nature of their appointments or assignments or imposed on them by the terms of any law or by any order or regulation issued pursuant to law or by any international agreement to which the United States is a party." 3/

In addition, the Act authorizes the Secretary of State to prescribe regulations consistent with law "in relation to the duties, functions and obligations of consular officers..." 4/

The Foreign Service Act thus merely acknowledges the existence of other authorities which determine the rights and duties of consular officers. Statutory sources of consular rights and duties (except with respect to immigration and nationality, which are not relevant to the present inquiry) 5/ are collected in subchapter X of chapter 14 of title 22, United States Code (copy attached). This subchapter contains 31 sections, generally derived from eighteenth and nineteenth century statutes, dealing with such diverse matters as solemnization of marriages, conservation of estates of decedents, certification of invoices, retention of papers of American vessels, and depositions and notarial acts.

1/ 22 U.S.C. 907, 924, 938.
2/ 22 U.S.C. 909, 923, 937.
3/ 22 U.S.C. 841.
4/ 22 U.S.C. 842
5/ Consular functions with respect to immigration and nationality matters are set forth in the Immigration and Nationality Act, 8 U.S.C. 1101 et. seq. In addition, consuls are authorized to issue passports pursuant to 22 U.S.C. 211a.

Consular functions are also specified in the various consular conventions and related treaties to which the United States is a party. These treaties reflect the views of the parties as to the appropriateness of various activities as legitimate consular functions. The most widely representative view of international practice in this regard is that set out in the 1963 Vienna Convention on Consular Relations. 6/ The Vienna Convention is in force for the United States and some ninety-one other countries. Article 5 of the Convention (copy attached) lists twelve general areas of consular responsibility, including such matters as protecting the interests of the sending State and its nationals, promoting commerce, performing notarials, administrative and quasi-judicial services and dealing with ships and aircraft of the sending State. 7/

Taken together, the laws of the United States and relevant treaties make clear that consuls are expected to perform a wide range of facilitative services on behalf of nationals of the sending State. They record births, deaths and marriages, notarize papers, issue travel documents, conserve estates of decedents, assist seamen, the ill and incarcerated, transmit letters rogatory, take depositions, and provide information on local business conditions. The implementing regulations of the Secretary of State 8/ are fully consistent with this characterization of consular functions.

6/ 21 UST 77, TIAS 6820. Guyana is also a party to the Vienna Convention.

7/ The 1951 bilateral consular convention between the United States and the United Kingdom, 3 UST 3426, TIAS 2494, is also in force for Guyana by virtue of that State's unilateral declaration of June 30, 1966. See Treaties in Force, 96 (1978 ed.). This bilateral treaty contains more detailed provisions than those in the Vienna Convention regarding protection of nationals, notarial and other services, estates and transfers of property and shipping. However, the nature of the functions described is fully compatible with the Vienna Convention.

8/ 22 CFR, Chapter I, Subchapters H-K.

In particular, there is nothing in the relevant laws, treaties or regulations which confers any law enforcement responsibilities on United States consular officers, or which authorizes them to undertake investigations or surveillance with respect to American citizens travelling or residing abroad. In the absence of such authorization, United States consular establishments are prohibited by federal statute from maintaining "any record describing how any individual exercises rights guaranteed by the First Amendment." 9/

The above-quoted prohibition, contained in the Privacy Act of 1974, was clearly intended to curtail not only the maintenance of records, but also the engaging by federal agencies in the kind of unauthorized surveillance activities which might lead to the compilation of records on the political or religious beliefs of American citizens. The legislative history shows that the statute was enacted in response to revelations concerning files developed by certain agencies during the war in Vietnam. 10/ The Act itself contains an express finding by the Congress that "the right of privacy is a personal and fundamental right protected by the Constitution of the United States" and that regulation of the collection, maintenance, use and dissemination of information by federal agencies was necessary to protect that right. 11/

This constitutional dimension of the problem of intrusion into the private affairs of American citizens was reemphasized by President Carter at his press conference of November 30, 1978. In commenting on the tragedy in Guyana, the President said:

9/ 5 U.S.C. 552a(e)(7).
10/ H.R. Rep. No. 93-1416, pp. 5-6; S. Rept. No. 93-1183, pp. 13-14.
11/ P.L. 93-578, §2(a)(4) and (5), 88 Stat. 1897.

> "It's unconstitutional for the Government of our country to investigate ... any group no matter how much they may depart from normal custom which is based on religious belief. The only exception is when there is some substantive allegation that the activities of those religious groups directly violate a federal law." 2/

Even before the enactment of the Privacy Act, the Department of State had maintained a policy against surveillance of Americans abroad. Secretary of State Dean Rusk, in a letter to Senator Edward Kennedy dated April 5, 1966, described as follows the State/Justice Department guidelines on handling requests by Justice for information concerning American citizens travelling abroad.

> "(1) such requests will be made by the Department of Justice only in cases where an important national interest would be served by the transmission of information that may be received; (2) as in the past, American diplomatic missions will engage in no surveillance; a mission will, on appropriate instructions from the Department of State, simply forward relevant information that may come to its attention; (3) requests for information will be initiated in the Department of Justice by a responsible officer, and the dispatch of a requesting message from the Department of State to a diplomatic mission will be handled by a responsible officer of this Department; (4) any such requesting message will be limited strictly to what is required for fulfilling the reporting function; (5) requests for information and any reports received in response will be handled on a restricted basis both at origin and destination, with distribution closely controlled to assure appropriate protection."

While the 1966 guidelines continue to apply, the instances in which requests are made, and the scope of those requests, are now limited by the subsequently enacted Privacy Act. More direct limitation on the collection of

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12/ 14 Weekly Compilation of Presidential Documents ____ (1978).

information concerning the activities of American citizens abroad are set out in Executive Order No. 12036 of January 24, 1978, entitled "United States Intelligence Activities." 13/ According to this Executive Order, surveillance and other intelligence measures directed against American citizens abroad are limited procedurally to activities authorized by judicial warrant or approved by the President and the Attorney General. These procedures may be invoked to undertake surveillance or otherwise to collect nonpublicly available information about an American citizen only in certain circumstances specified in the Order (chiefly involving possible criminal acts or involvement with a foreign power). 14/

13/ 43 FR 3674 (1978).

14/ Section 2-208(i) of the Executive Order excepts from the prohibition against collection, dissemination and storage of nonpublic information concerning U.S. citizens "[i]nformation concerning United States persons abroad that is obtained in response to requests from the Department of State for support of its consular responsibilities relating to the welfare of those persons." This provision is not intended as a basis for investigations of American citizens by or on behalf of the Department of State. Rather, it avoids inhibitions against the dissemination of information by investigative agencies to the Department of State when that information is needed in order to fulfill consular responsibilities.

3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending State only with the consent of the receiving State.

4. The consent of the receiving State shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.

5. The prior express consent of the receiving State shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

Article 6

Consular functions

Consular functions consist in:

(*a*) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;

(*b*) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;

(*c*) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;

(*d*) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State;

(*e*) helping and assisting nationals, both individuals and bodies corporate, of the sending State;

(*f*) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(*g*) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending State in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(*h*) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(*i*) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;

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(*j*) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(*k*) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(*l*) extending assistance to vessels and aircraft mentioned in sub-paragraph (*k*) of this Article and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending State;

(*m*) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

Article 6

Exercise of consular functions outside the consular district

A consular officer may, in special circumstances, with the consent of the receiving State, exercise his functions outside his consular district.

Article 7

Exercise of consular functions in a third State

The sending State may, after notifying the States concerned, entrust a consular post established in a particular State with the exercise of consular functions in another State, unless there is express objection by one of the States concerned.

Article 8

Exercise of consular functions on behalf of a third State

Upon appropriate notification to the receiving State, a consular post of the sending State may, unless the receiving State objects, exercise consular functions in the receiving State on behalf of a third State.

Article 9

Classes of heads of consular posts

1. Heads of consular posts are divided into four classes, namely:
   (*a*) consuls-general;
   (*b*) consuls;